BARBADOS

EMPLOYMENT RIGHTS TRIBUNAL

NO. ERT/2016/172

BETWEEN

PAULINE WOOD **CLAIMANT**

AND

JADA BUILDERS INC. **RESPONDENT**

TRIBUNAL

Kathy-A. Hamblin **Deputy Chairman**
Deighton Marshall **Member**
Ulric Sealy **Member**

APPEARANCES

Caswell Franklyn for the Claimant
Paul Lewis (Former HR Director, Jada Group) for the Respondent

Date: May 4, 2023, May 17, 2023, May 30, 2023

DECISION

[1] INTRODUCTION

[1.1] This matter was referred by the Chief Labour Officer to the Tribunal by letter dated February 19, 2016. The Claim Form was filed on April 12, 2016, and on October 12, 2021, the Claimant filed a four-and-a-half-line letter outlining the circumstances of her termination. Her witness statement was not filed until April 20, 2023. A case management conference was held on May 4, 2023, and in partial compliance with the Order of the Tribunal made on that date, the Respondent filed its Form 2 response on May 10, 2023. The matter was heard on May 17, 2023.

[1.2] The Claimant's recollection of the content of certain documents and of key facts was spotty. She appeared at times to be frustrated and was easily confused, which was as much a function of her age as it was of the length of time which has elapsed since the submission of her complaint. Like the Claimant, the Respondent's representative Paul Lewis admitted that he too had difficulty recalling certain facts.

[1.3] The Claimant's pleadings were barebone and were filed without supporting documents. She modified her witness statement in oral testimony with the leave of the Tribunal, to correct the assertion at paragraph 6 therein, that she "*was never issued with any documents*" or with a letter of termination. The Claimant confirmed that she did receive and hand over those documents to her representative, Caswell Franklyn.

[1.4] Despite having been ordered by the Tribunal at the case management conference to file its witness statements, the Respondent failed or refused to comply with that order. The Respondent opted to rely solely on its Form 2 response and the attachments thereto, which Mr. Lewis "*viewed as [the Respondent's] statement*".

[2] **FACTS**

[2.1] The Claimant is an 83-year-old wheelchair-bound, unilateral amputee. She worked for the Respondent, JADA Builders Inc. as a maid for 18 years, commencing April 8, 1997. The Claimant alleged that she was unfairly dismissed on August 27, 2015. She testified that one of her supervisors, Jerry Gooding, approached her on Wednesday, August 26, 2015, hugged her and told her, "*Ms. Wood, you are a good worker but after tomorrow we will have no work for you.*" The Claimant stated that she reported for work as usual on August 27, 2015, and worked her full shift, after which she was never called back out to work. She testified that "*nuhbody din explain nutten to me.*"

[2.2] The Respondent company countered that the Claimant was retired as a result of a "*slowing down of projects*". The Respondent contended that the Claimant was aware that the company's fixed retirement age for all employees is 66. The Claimant attained that age on April 12, 2006, but was allowed, at her

request, to continue to work for an additional 9.25 years. The Respondent argued also that the Claimant, "*being a long standing employee of JADA Builders Inc., would have been given notice to age 66 and the Company should not now be punished for allowing her an additional nine years of service beyond the clearly stated retirement age.*"

[2.3] The Respondent did not refute the Claimant's account of how she was informed of her pending "*retirement*". However, the company asserted that on August 27, 2015, a letter of termination bearing that date was handed over to the Claimant's son, Ryan Wood, who signed for the letter and a cheque for one week's pay in lieu of notice on the Claimant's behalf.

[3] THE ISSUES

[3.1] There are two issues for determination by the Tribunal. The first is whether the Claimant is entitled to the protection of the Employment Rights Act, 2012-9 ("the Act"), she having long reached and passed the contractual age of retirement and, secondly, whether termination of her services with one day's notice was unfair.

[4] THE LAW

(a) APPLICABILITY OF THE ACT TO EMPLOYEES OVER RETIREMENT AGE

[4.1] There is no reference to age in the Act. That is no anomaly. The Act affords protection to employees against discrimination based, among other things, on age.

Section 30. (1) (c) provides as follows:

"**30.** (1) *A dismissal of an employee contravenes the right conferred on him by section 27 where:*

(c) the reason for the dismissal is....

(xi) a reason that relates to

(A) *the race, colour, age, marital status, religion, political opinion or affiliation, national extraction, social origin or indigenous origin of the employee".*

It would be incongruous for the legislation to provide that protection whilst at the same time limiting the applicability of the Act by reference to age.

[4.2] It is the opinion of the Tribunal that where, by mutual agreement between employer and employee an employee is permitted to work beyond the statutory or a contractually stipulated retirement age, in the absence of any statutory or other limitation, that employee is afforded the full protection of the Act. As such, the answer to the first question for determination by the Tribunal is in the affirmative.

(b) REASON FOR DISMISSAL

[4.3] Under section 29. (1), the burden of proof of the reason for dismissal is on the Respondent employer. Pursuant to section 29. (2), an employer has the right to dismiss for, *inter alia*, a reason related to the capability of the employee to perform work of the kind which he was employed by the employer to do, or for a reason related to the conduct of the employee, or for redundancy. The Claimant's termination was neither related to her capability nor to her conduct.

[4.4] In the termination letter, the Respondent attributed the Claimant's "*retirement*" to "*the slowing of projects and limited manpower*". On the Termination/Lay-off Certificate of the same date, the Respondent listed as the reason for termination, "*retirement-slowing down of projects.*" In oral statements made to the Tribunal, Mr. Lewis initially reiterated that the principal reason for the Claimant's termination was "*slowing down of projects.*"

[4.5] Section 31. 2 (b) recognises cessation or diminution, or anticipated cessation or diminution of "*the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed*", as justifiable reasons for termination. While the purported reason for the Claimant's dismissal raises a defence of redundancy, redundancy was not specifically pleaded in defence to the claim.

[4.6] Even if the facts permitted the Tribunal to construe the reason given for the dismissal to be a *de jure* redundancy regardless of how it was pleaded, that defence would fail for two reasons. The first is that despite claiming a decrease in business as the basis for the Claimant's dismissal, the Respondent adduced no evidence of a reduction of its workload or of a concomitant reduction of its workforce by more than one person. The second is that there is no evidence before the Tribunal of the Respondent's compliance with section 31. (4), (5) or (6) of the Act, which are critical precursors to the establishment of the right to dismiss for redundancy.

[4.7] There is no record of the number of persons who were impacted by the "*slowing of projects*" or, of whether that number reached the statutory threshold of 10% of the workforce so as to trigger the requirement for consultation with the Claimant six weeks in advance of the proposed date of dismissal. Similarly, there is no record of provision to the Claimant's union or the Chief Labour Officer of a statement of the reasons for and the particulars of the dismissal, or of notification having been given to the Chief Labour Officer of any special circumstances which rendered it impracticable for the Respondent to engage in the required consultations.

[4.8] It is the opinion of the Tribunal that the Respondent has not demonstrated that the reason for the Claimant's dismissal falls within section 29. (2) of the Act or, that it was for *"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."* Accordingly, the Respondent has not discharged its burden of proof.

[5] PROCEDURAL FAIRNESS

[5.1] The procedure leading up to the Claimant's termination was flawed. The Claimant contended that she was given one day's verbal notice. That claim was admitted by the Respondent. The Respondent, however, refuted the Claimant's assertion that she left at the end of her shift without receiving a letter of termination, an NIS termination letter or any other correspondence. The Respondent stated that a letter of termination bearing the dismissal date was prepared and delivered to the Claimant's son on August 27,

2015. The Respondent could not explain why, if the letter was prepared on August 27, 2015, it was not handed to the Claimant, but insisted that the Claimant instructed the Respondent to deliver the letter to her son. Mr. Lewis contended that Mr. Wood was unlikely to have signed the letter if it was dated any other date than that on which it was delivered to him.

[5.2] The Tribunal questions the accuracy of Mr. Lewis' statements. If the letter was in fact prepared on the date of the Claimant's dismissal, there would have been no reason for the Claimant's son to have signed for the same on her behalf. The Tribunal concludes that it is more likely than not that the letter was not prepared or handed over until sometime after August 27, 2015.

[5.3] The letter of termination, signed by Mr. Lewis and co-signed by Ryan Wood, does not advise the Claimant of her right to appeal the decision to dismiss her. There is no evidence of any meeting having taken place between the Claimant or her representative and any representatives of the Respondent prior to her termination. The letter failed to properly document the payments made to the Claimant or to comprehensively articulate the reason for her dismissal. It is settled law that a dismissal which falls short of the statutory procedural requirements is unfair.

[6] DISCUSSION

[6.1] The Respondent maintains that its "*retirement*" of the Claimant was justified. Whilst slowdown in the Respondent's workload was the ground upon which they purported to "*retire*" the Claimant, at the hearing, though initially maintaining that position, the Respondent sought shelter in the retirement clause which is set out in its "Policy and Procedures" manual ("the manual"). The full text of that clause is as follows:

> ***"Retirement***
>
> ***Normal retirement age is sixty-six (66) for all employees.***
>
> ***The Company may however without prejudice and at its sole discretion, allow persons to work beyond retirement age. In such circumstances the terms of employment will be determined by mutual consent."***

[6.2] Mr. Lewis asserted that the Respondent "*as a matter of company policy does not issue correspondence extending people's retirement, only that they consent and request to work beyond retirement.*" The rationale, according to Mr. Lewis, is "*because we don't vary the terms. We don't change her payment schedule, her wages remain the same, her terms and conditions of employment remain largely the same. We would only normally put something in writing if we sought to vary those terms.*" Mr. Lewis disputed the Claimant's contention that she did not receive a raise of pay after she attained the age of 66 and declared emphatically that the Claimant was a beneficiary of "*two, maybe three*" wage increases afforded to all staff in accordance with the collective bargaining agreement between the Respondent and the Barbados Workers' Union.

[6.3] It is unfair and unreasonable for the Respondent, having retained the Claimant for nine years subject to the same terms and conditions which existed prior to her attaining the age of 66, to assert that the Claimant's statutory right not to be unfairly dismissed was not among those terms.

[6.4] This Tribunal is of the view that the Claimant's age, and not a decline in the Respondent's business, was the real reason for the Claimant's dismissal. Mr. Lewis unwittingly made that admission. One of the questions he put to the Claimant was as follows:

> "*Are you aware that when we concluded your employment on the 27th of August in 2015, were you aware that your services were being concluded as a function of your retirement from the company in accordance with your age?*"

He also asked the Claimant if she was aware that her "*services were concluded as a result of [her] having surpassed the age of 75.*"

[6.5] In our view, the Respondent's practice of not documenting mutually consented to terms pursuant to which employees who work past retirement age are retained, is convenient. It facilitates the Respondent's dismissal of an employee who has passed retirement age with minimal notice and without regard to the Act or to any obligations imposed, or rights bestowed, thereunder.

According to Mr. Lewis, "*it is normal policy when we have a reduction in work that any employees who have attained retirement age are the first to be concluded before we look at a termination or layoff program for employees who have not yet reached retirement age.*"

[6.6] Neither party cited authorities in support of their respective positions. The Tribunal considered *Norman Grant v. Barbados Beach Club, ERT 2018/019*, a 2020 decision of a differently constituted panel. In that case, the Tribunal held that *Grant's* unceremonious dismissal with even less notice than was given to the Claimant in the instant case was not unfair. *Grant's* contract provided for retirement at age 65. He was dismissed without notice 10 days after his 65th birthday. The key distinguishing feature between *Grant* and the instant case is that the Respondent's policy allowed the Claimant to opt to continue to work beyond the company's retirement age, provided the Respondent consented to her doing so. There was no similar provision in *Grant's* case. Consequently, the claim that Barbados Beach Club discriminated against Grant based on his age was dismissed. Grant was awarded one month's salary as a result of the employer's failure to give adequate notice.

[6.7] The sole ground raised in the Claim Form was that the Claimant's dismissal "*was unfair because [her] services were terminated with only one day's notice after being employed by Jada Builders Inc. for eighteen years*." This was a missed opportunity to test the age discrimination provision in the Act. The Respondent's "oldest in, first out" policy, which is documented nowhere in the manual or elsewhere, is on its face discriminatory. Age and no other factor informs its application. We are of the view that had it been pleaded and argued, this case would have invited serious discussion on, and consideration of, an award for age discrimination, protection against which is enshrined in section 30 (1) (xi) (A), cited above.

[6.8] The Respondent pleaded with the Tribunal not to "*punish*" or "*burden*" the company for allowing the Claimant to work past her retirement age. Implicit in that appeal is the suggestion that this employer should be allowed to disregard the Act because of its "generosity" to its elderly employees. The role of the Tribunal is neither punitive nor to unfairly burden employers. It is our duty to interpret the legislation and to apply it even-handedly, ensuring that the right of employees not to be unfairly dismissed is preserved.

[6.9] The Respondent agreed with the Claimant that the terms of her continued employment after age 66 (and by extension her termination) would be determined by mutual consent. However, the Respondent breached that agreement when the unilateral decision to dismiss the Claimant with 24 hours' notice was made.

The Tribunal's unanimous finding is that the undignified, verbal dismissal of the Claimant with one day's notice was unfair.

[7] DISPOSAL

[7.1] Because of her physical disability, the Claimant is incapable of returning to the workforce as a maid. Accordingly, the Tribunal makes the following monetary award.

[7.2] The Claimant's weekly wage was $326.40. She gave 18 unbroken years of service and was entitled to receive minimum statutory notice of 10 weeks in accordance with section 22. (1) (e) of the Act. The Claimant complained that she was given one day's notice of termination and received one week's pay in lieu of notice. The Respondent is ordered to pay the Claimant the sum of **$2,937.60** for nine weeks' outstanding notice.

[7.3] The Respondent conceded that the Claimant was given one day's notice of termination of her employment, and for that reason, the Respondent considered it "*fair and decent*" to pay her a "*gratuity*" of one week's pay in lieu of notice. The failure to provide adequate notice is viewed so seriously by the legislature, that included in the Act is section 24. (2) (a), which is, in effect, a penal clause. Pursuant to that section, the Respondent is ordered to pay the Claimant, in addition to the sum of $2,937.60 for outstanding notice, the sum of **$652.80** being two additional weeks' notice.

[7.4] If the Respondent fails to comply with the order set out at paragraph [7.3] above, the Respondent shall pay the Claimant a sum equal to 4 weeks' wages for each month or part of a month during which the Respondent fails to comply with that order.

[7.5] Additionally, the Respondent is ordered to pay the Claimant basic pay in the sum of **$17,625.60** which represents three weeks' pay for each of the 18 years she was employed by the Respondent. That sum is calculated in accordance with paragraph 2 of the Fifth Schedule to the Act. It is important to point out that calculation of basic pay is informed by no other consideration than the length of the employee's service. As such, the fact that the Claimant was past the Respondent company's retirement age when she was dismissed does not influence the calculation of the award payable to her by the Respondent.

[7.6] The total sum payable to the Claimant by the Respondent is **$21,216.00**. The said sum shall be paid to the Claimant on or before **June 28, 2023**. Non-compliance with this order will result in the additional sum of **$1,305.60** being due and payable to the Claimant commencing **June 29, 2023**, and continuing for every month or part thereof that the said sum remains unpaid.

Deputy Chairman

Member

Member